UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. LOUIS CARDINALS, LLC

Case 14-CA-213219

and

JOE BELL, an Individual

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION AND ORDER REJECTING SETTLEMENT

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Respondent St. Louis Cardinals, LLC ("Respondent" or "Cardinals"), by its undersigned counsel and pursuant to Rule 102.46 of the Board's Rules and Regulations, respectfully files the following Brief in Support of Exceptions to the May 15, 2020 Supplemental Decision of Administrative Law Judge ("ALJ") Arthur A. Amchan,[1] and the ALJ's April 8, 2020 Order Rejecting Settlement.[2]

[1] References to the ALJ's Supplemental Decision are identified by the letter "D" followed by page and line number, e.g., "D. ___." References to the hearing transcript are by the letters "Tr.", followed by page and line number, e.g., "Tr. ___:___." References to exhibits introduced by the General Counsel are by the letters "GC", followed by exhibit number, e.g., "GC-___". References to exhibits introduced Jointly are by the letter "J", followed by exhibit number, e.g., "J-___." Finally, references to exhibits introduced by the Cardinals are by the letters "R-" followed by exhibit number, e.g., "R-__."

[2] In filing its Exceptions, Respondent does not waive, but rather explicitly preserves, all specific exceptions and defenses raised in its November 14, 2018 Exceptions to the ALJ's initial Decision in this case. Importantly, unlike the ALJ's Supplemental Decision, this Brief will focus on the narrow issue remanded by the Board: Respondent's *Wright Line* rebuttal defense, as well as a Settlement Agreement the ALJ rejected while the case was remanded to him. This Brief therefore will not address issues related to whether or not James Maxwell and/or Kramer engaged in any protected activities, nor will it address the *Wright Line prima facie* case analysis.

SUMMARY OF ARGUMENT

The ALJ erred in several critical areas. First, his Supplemental Decision contravened the Board's remand in this case, including by improperly calling into question the Board's own application of its *Wright Line* rebuttal defense standard. Further, by relying on highly erroneous grounds, including discrediting uncontradicted evidence, directly misstating and mischaracterizing evidence in the record, and focusing upon irrelevant facts, the ALJ performed analytical acrobatics to shove aside evidence that Respondent would not have offered work to the alleged discriminatees, even absent any purportedly protected activities. Such discarded (and unrebutted) evidence includes the alleged discriminatees' drug use during the work day, poor work ethic/performance, one alleged discriminatee's statement that he would not work for the new Painting Foreman, and the presence of superior options for Respondent's painting crew. Moreover, despite serious threats of physical violence by one alleged discriminatee (made to a Board agent and documented in a Report by the Federal Protective Services), against the Painting Foreman and Respondent's counsel, the ALJ improperly rejected a Settlement Agreement executed by the General Counsel and Respondent. For all of these reasons, the Board must reverse the ALJ's findings and conclusions, and dismiss the allegations regarding the two alleged discriminatees at issue.

I. The ALJ Erroneously Contradicted and Subverted the Board's Decision Remanding this Case.

The Board remanded the instant case to the ALJ "for further analysis and findings of whether the Respondent carried its *Wright Line* defense burden" with regard to alleged discriminatees James Maxwell and Eugene Kramer. 369 NLRB No. 3, slip op. at *2 (Jan. 3, 2020). In support of its rebuttal defense under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) ("*Wright Line*"), Respondent excepts:

1. To the ALJ's conclusion that the Board's remand in this case "calls into question whether the Board still adheres to" the *Wright Line* standard, because such conclusion is contrary to law. D. 7 n. 9.

2. To the ALJ's continued reliance on the timing of an offer made to previous alleged discriminatee Thomas Maxwell as evidence of unlawful motives, and failure to find that such offer supports Respondent's *Wright Line* rebuttal defense, despite the Board's explicit finding that Respondent did not violate the Act with regard to Thomas Maxwell, because such reliance and failure are contrary to law and contrary to substantial evidence in the record. D. 6:21-26, 8 n. 10; 369 NLRB No. 3, slip op. at *2.

3. To the ALJ's reliance on testimony regarding prior alleged discriminatee Joe Bell, because such reliance is irrelevant and contrary to substantial evidence in the record. D. 4 n. 5, 8:6-14.

4. To the ALJ's conclusion that the alleged discriminatees did not lose the protection of the Act by acting in contravention of Section 8(b)(1)(B) of the Act, because this conclusion exceeds the scope of the Board's remand, and is thus irrelevant and contrary to law. D. 6-7 n. 8.

5. To the ALJ's treatment of Respondent's *Wright Line* rebuttal defense as a matter of witness credibility, rather than a matter requiring overall affirmative defense analysis, because such treatment is contrary to law and contrary to substantial evidence in the record. D. 8:2-4.

The ALJ's Supplemental Decision demonstrates a pervasive disregard for the Board's remand in this case. Notably, footnote 9 on page 7 of the Decision calls into question whether the Board continues to adhere to the *Wright Line* burden-shifting framework. The Board's remand decision noted the ALJ improperly failed to conduct a *Wright Line* rebuttal analysis. The Board so concluded due to the ALJ's incorrect view that Painting Foreman Patrick Barrett's candid admission that internal charges filed with Painters District Council 58 ("Union") factored "a little bit" into his decision not to offer work to James Maxwell and Eugene Kramer. As the Board correctly observed, this testimony supports only a *prima facie* finding, but does not obviate the need to assess whether Barrett would have offered work to James Maxwell and Kramer even absent animus against those purportedly protected activities. Slip op. at *1.

In response, the ALJ's Supplemental Decision slaps back at the Board, referring to the "straw that broke the camel's back" language at footnote 14 of *Wright Line*. However, that *Wright*

Line language is *predicated* upon a finding that a respondent cannot otherwise carry its rebuttal burden. In other words, the *Wright Line* Board made clear in footnote 14 merely that the rebuttal defense analysis should focus on whether animus toward protected activities was "enough to determine events," and not the degree to which such animus determined events. This language does nothing to change the analysis where an employer's legitimate reasons would result in the same decision, regardless of whether protected activities, as determined at the *prima facie* stage, also served as "motivating factor" in its decision. *Wright Line*, 251 NLRB at 1089. The ALJ's reading of *Wright Line* would eliminate the rebuttal portion of the analysis by conflating it entirely with the *prima facie* analysis. Under the ALJ's approach, any *prima facie* showing would also defeat any potential rebuttal.

Thus, the Board has applied *Wright Line* correctly, and the ALJ's refusal to adhere to that application is improper. Moreover, the ALJ's continued disagreement with the Board's analysis infects the entirety of the Supplemental Decision, which repeatedly relies upon specious and unsupported grounds to reject the legitimate reasons Barrett possessed for not offering work to James Maxwell and Kramer.

Furthermore, the ALJ also expressed continued disagreement with the Board's decision to dismiss the allegations regarding Thomas Maxwell (James's brother). Slip op. at *2. Specifically, while the ALJ initially found a violation based on the timing of an offer made to Thomas Maxwell, the Board rejected that finding because he suffered no adverse action, and the offer satisfied Respondent's *Wright Line* rebuttal burden. *Id*.

The example of Thomas Maxwell shows Respondent has satisfied its rebuttal burden. While Thomas Maxwell engaged in the same purportedly protected activities as James Maxwell and Kramer, Barrett testified that Thomas Maxwell alone received an offer because Thomas is "a

good painter." (Tr. 321:21-23). These circumstances show the quality of work, rather than protected activities, was the factor that "determine[d] events." *Wright Line*, 251 NLRB at 1089. The ALJ, however, casts that analysis aside by continuing to call the lawfulness of Barrett's offer to Thomas Maxwell into question. D. 6:21-26, 8 n. 10. The Board made its determination with regard to Thomas Maxwell, and the ALJ cannot continue to disagree with that decision merely because it is incompatible for his preferred outcome on James Maxwell and Kramer.

The ALJ further relies upon analysis pertaining to alleged discriminatee Joe Bell, referring to Respondent's reasons for not offering him work (i.e., that he knew that Joe Bell was already performing painting work at Busch Stadium for one of Respondent's contractors) as "obviously pretextual." D. 4 n. 5, 8:6-14. He also includes in his analysis a finding that James Maxwell and Kramer did not lose the protection of the Act because their internal Union charges sought to create a violation of Section 8(b)(1)(B) of the Act. D. 6-7 n. 8. Neither the Joe Bell allegations (which Respondent has fully remedied), nor the Section 8(b)(1)(B) issues were remanded by the Board. Consequently, the ALJ's inclusion of those allegations and issues in his Supplemental Decision inappropriately colored the separate *Wright Line* rebuttal defense analysis regarding each of James Maxwell and Kramer.

Moreover, the ALJ misapplies the *Wright Line* rebuttal analysis because he treats it as an issue of pure credibility. This error occurs specifically where he states, "I decline to credit Pat Barrett's testimony to the extent it suggests that Respondent would not have hired James Maxwell and Eugene Kramer even if they had not filed internal union charges against him." D. 8:2-4.

In addition to this specific finding, the ALJ's erroneous conflation of credibility and the rebuttal analysis pervades the entire Supplemental Decision. Respondent has identified *infra* numerous specific instances in which the ALJ's findings and conclusions flatly mischaracterize

the record, and thus meet the "clear preponderance of the evidence" standard of *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Separate and apart from those instances, however, the Board does not apply the *Standard Dry Wall* standard where an ALJ incorrectly characterizes "derivative inferences or legal conclusions" as credibility determinations. *Plaza Auto Center*, 360 NLRB 972, 980 (2014) (further explaining at 980-81, "the Board is free to draw different derivative inferences and conclusions from the evidence than did the administrative law judge.").

By broadly discrediting Barrett with regard to Respondent's affirmative defense at large, the ALJ has improperly "effectively disqualified [him] as a witness, as opposed to making a true credibility determination, which considers the witness' testimony in context, including, among other things, his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D Construction Group, Inc.*, 339 NLRB 303, 305 (2003). In this regard, Respondent notes the Supplemental Decision makes ***no credibility determinations based upon witness demeanor***. The word, "demeanor" does not appear once in the Supplemental Decision. *Humes Electric, Inc*., 263 NLRB 1238, 1238 (1982) (examining the record *de novo* where, "although the Administrative Law Judge referred generally to the demeanor factor, certain credibility resolutions do not appear to have been based on his observations of the witnesses' testimonial demeanor.").

As a result, the Supplemental Decision evinces a broad misapplication of standards. Through disagreement with the Board's Decision remanding this case (on both the *Wright Line* standard overall and Thomas Maxwell), reliance upon issues not included in the remand, and overly broad approaches to credibility determinations, the ALJ's Supplemental Decision abounds with errors the Board must rectify through dismissal of the James Maxwell and Kramer allegations.

II. The ALJ Erroneously and Explicitly Discredited Uncontradicted Evidence.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

6. To the ALJ's blanket rejection of uncontradicted evidence in the record, because such rejection is contrary to law, unsupported by record evidence, and contrary to substantial evidence in the record. D. 8:20-29.

7. To the ALJ's conclusion that former Painting Foreman Billy Martin "did not recall painters whose work was substandard" because such conclusion is unsupported by record evidence. D. 8:25-26.

8. To the ALJ's conclusion that the absence of discussions of the specific reasons why Painting Foreman Patrick Barrett did not offer work to James Maxwell and Kramer during a grievance meeting renders such reasons incredible, because this conclusion is unsupported by record evidence and contrary to substantial evidence in the record. D. 8:26-29, 9:3-4, 9:22-25.

In addition to the numerous other errors made by the ALJ as discussed above, the most egregious error made by the ALJ in the Supplemental Decision was his flawed treatment of uncontradicted and unrebutted record evidence, which evidence seems to be greatly distorted in order to support the misguided conclusions in his Original Decision. In the Supplemental Decision, the ALJ states:

> As Respondent points out in its brief, uncontradicted testimony is usually credited. However, there is no obligation for a judge to credit a witness' uncontradicted testimony when other circumstances indicate that it is unreliable, *Aero, Inc.*, 237 NLRB 455, fn. 1 (1978); *Operative Plasterers' & Cement Masons International Association, Local 394 (Burnham Bros., Inc.),* 207 NLRB 147 (1973).

D. 8:20-24.

The ALJ then cites two reasons why he does not credit uncontradicted evidence here, neither of which withstand scrutiny.[3] First, he argues former Painting Foreman Billy Martin

[3] The ALJ frames this treatment of unrebutted evidence with regard to James Maxwell, but does not address the issue with regard to Kramer. However, the unrebutted evidence regarding Kramer is virtually identical to that regarding James Maxwell, and the ALJ analyzes the Kramer allegation immediately following the James Maxwell allegation. Respondent therefore assumes, for the purposes of this Brief, that the ALJ intended to apply his rejection of unrebutted evidence to both James Maxwell and Kramer; but the ALJ failed to specifically address the unrebutted evidence against Kramer.

recalled James Maxwell (and Kramer) for multiple years, and, "Martin did not recall painters whose work was substandard." D. 8:25-26. As an initial matter, this statement contradicts the undisputed record evidence , discussed in further detail *infra*, that Barrett possessed full discretion to assemble his crew, and was not bound by Martin's practices. (Tr. 283:25-284:3, 313:7-15).

Even more troubling, however, the ALJ fabricated this assertion out of thin air. There is no evidence in the record whatsoever supporting the ALJ's assertion regarding Martin's handling of poorly performing employees. Furthermore, even if such evidence did exist, Martin did not testify, and so any evidence of this purely subjective statement would lack foundation.

The only testimony remotely related to the ALJ's statement is Barrett's agreement with a question on cross-examination that, "Mr. Martin knew how to get rid of problem employees." (Tr. 350:10-11). This question followed a series of other questions about the five painters whom Martin had not recalled. (Tr. 346:8-350:4). Barrett did not know the reason why Martin did not recall one employee (George Hendrick) (Tr. 348:8-23), one employee left the painting trade (Joe Birkle) (Tr. 350:3-7), Martin did not return another because he previously resigned multiple times (John Cummings) (Tr. 346:24-347:5), and Martin did not return two others because they had poor interpersonal relationships with other employees (Joe Barrett and Cary Thornton) (Tr. 347:6-348:8). Thus, there is no evidence in the record that Martin ever declined to recall an employee due to poor performance. In fact, the record evidence suggests that Martin *never* declined to recall an employee for performance reasons.

The second reason given by the ALJ for rejecting unrebutted evidence is that neither Barrett nor any other Respondent representatives cited the reasons for Barrett refusing to recall James Maxwell and/or Kramer during a February 21, 2018 grievance meeting with the Union, and that Vice President of Operations Matt Gifford stated during the meeting that James Maxwell and

Kramer were eligible for rehire. (D. 8:26-29). This reason fails on similar grounds. First, there was *no reason* for Barrett or any other Respondent representatives to cite the reasons for refusing to recall James Maxwell and/or Kramer during that meeting. No Union representative asked what those specific reasons were, such reasons were completely irrelevant to that meeting, and the Union ***agreed*** during this meeting, as it had (subject to a request that Barrett avail himself of the voluntary option to use the hiring hall) in a prior January 9, 2018 meeting, that Respondent possesses the contractual right to select painters at its discretion. (Tr. 310:25-311:8) (R-10).

The only evidence of any exchange during the meeting that pertained to Barrett's reasons for declining to offer work to James Maxwell and/or Kramer is the meeting minutes, which state:

> [A Union representative] asked for clarification as to whether the grievants were fired or whether they were laid off due to lack of work.
>
> Employer representative, Matt Gifford, said the grievants are eligible for rehire at this point.

(R-10, p. 3).

This exchange does not undermine the unrebutted reasons Barrett explained at hearing for declining to offer work to James Maxwell and/or Kramer. In fact, James Maxwell and Kramer were neither fired nor laid off due to lack of work. Instead, they simply were not amongst those painters whom Barrett desired to be part of his new crew. Gifford's (hearsay) statement that they were eligible for rehire at the time captured this distinction. Being "eligible for re-hire" is simply not the same thing as being amongst the painters Barrett desired, for legitimate reasons, to include on his crew.

The two cases cited by the ALJ in support of his rejection of unrebutted evidence are inapposite. In *Aero Corp.*, 237 NLRB 455, fn. 1 (1978), the evidence at issue was not actually uncontradicted, because the testimony was both internally inconsistent, and too vague to establish the asserting party's contention. Two company witnesses testified that a wage survey commenced

in "the middle or latter part of September," but when informed on cross-examination that the company learned of the union's organizing campaign on September 26, one of those witnesses testified the survey began before she left town for a seminar on September 25. The Board, quoting the Judge, also noted the "wage survey" at issue was "cursory in nature" and "without documentation." *Id*. Thus, the ALJ, as upheld by the Board, did not credit the company's purportedly "uncontradicted" evidence that the wage survey began before it learned of the organizing campaign.

Likewise, in *Operative Plasterers' & Cement Masons International Association, Local 394 (Burnham Bros., Inc.)*, 207 NLRB 147 (1973), the evidence at issue actually *was* contradicted, and lacked foundation. The Board discussed testimony in which a witness claimed the respondent union's president told him the reason for a strike was to cause the employer to make contributions into an escrow fund. It explained that truly "uncontradicted" testimony "is not present in this case" and "the circumstances of the case, and the record as a whole" provided grounds to find other reasons motivated the union's strike. Thus, as in *Aero Corp*., the circumstances differed substantially from those here.

Here, as discussed further *infra*, the unrebutted evidence at issue is Barrett's testimony that he did not wish to include James Maxwell and Kramer on his crew because of marijuana use on lunch breaks, poor work ethic by James Maxwell, and poor performance by both, and James Maxwell stating he would not work for Barrett. As also discussed *infra*, James Maxwell admitted in his testimony that he had made the statement that he could not work for Barrett, and, therefore, there is no dispute regarding this comment made by James Maxwell. Regarding the remaining issues, the General Counsel never called any of the Charging Parties, nor anyone else, to rebut Barrett's testimony. This failure is particularly revealing for James Maxwell, who sat through the

entire hearing as the General Counsel's representative, but ***never took the stand to rebut Barrett's testimony***. (Tr. 12:8-10).

These reasons form the solid foundation of Respondent's *Wright Line* rebuttal defense. They stand uncontradicted on the record, and unquestionably provide ample legitimate reasons supporting Barrett's decision not to include James Maxwell and/or Kramer on his painting crew. The only valid conclusion available to the ALJ, based on this unrebutted evidence, was that Barrett did observe: (1) James Maxwell and Kramer smoking marijuana on lunch breaks; (2) a poor work ethic by James Maxwell; and (3) poor work performance by both James Maxwell and Kramer. Instead, his Supplemental Decision mischaracterizes the record on the two points described above (i.e., a completely unfounded assertion about prior Painting Foreman Martin's recall practices, and Respondent's failure to unnecessarily cite reasons for Barrett's decisions during a grievance meeting), and the ALJ incorrectly relies upon two Board cases in which the Board found evidence at issue was, in fact, contradicted. The Judge's erroneous treatment of uncontradicted evidence is thus central to his improper rejection of Respondent's *Wright Line* rebuttal defense, and requires reversal of his Supplemental Decision.

III. The ALJ Erroneously Found that Evidence of James Maxwell and Eugene Kramer Smoking Marijuana During the Work Day, Exhibiting Poor Work Performance and Work Ethics, and/or James Maxwell Stating He Could Not Work for Barrett Did Not Establish Respondent's *Wright Line* Rebuttal Defense.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

9. To the ALJ's conclusion that the purported absence of discussions of the specific reasons why Painting Foreman Patrick Barrett did not offer work to James Maxwell and Kramer in a Board affidavit in support of a charge filed by Respondent against Painters District Council Local 58 ("Union") renders such reasons incredible, because this conclusion is unsupported by record evidence and contrary to substantial evidence in the record. D. 9:3-5, 9:22-25.

In addition to the two factors the ALJ provides for rejecting unrebutted evidence about the reasons for which Barrett decided not include James Maxwell and/or Kramer on his 2018 painting

crew (as described above), the ALJ also relies upon a number of other erroneous findings. First, as a broad matter, he claims Barrett did not raise those specific issues in a Board affidavit. D. 9:3-5, 9:22-25. Barrett provided the affidavit in question, however, in support of a charge filed by Respondent against the Union, alleging a violation of Section 8(b)(1)(B) of the Act. (Tr. 367:2-20). Consequently, the reasons Barrett decided not to offer work to James Maxwell and/or Kramer *were not the subject of that affidavit and were not otherwise necessary for that affidavit*. Furthermore, the affidavit did refer to performance issues with those painters, and Barrett testified both that he believes marijuana affected their performance, and that he considers marijuana use during the work day to be a performance issue. (Tr. 324:8-10, 327:7-9, 391:19-392:3). Consequently, the ALJ errs by incorrectly finding inconsistencies between Barrett's testimony and his affidavit in support of another separate charge, even though no such inconsistency exists.

A. Barrett Would Not Have Offered Work to James Maxwell or Kramer, Even Absent Any Purportedly Protected Activities, Because He Observed Both Smoking Marijuana During the Work Day.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

10. To the ALJ's finding that Barrett did not specify the time of day in which he witnessed James Maxwell and Kramer possessing and using marijuana, and the failure to find that such events occurred during lunch breaks, because such finding and failure are unsupported by record evidence and contrary to substantial evidence in the record. D. 8:17-18, 8 n. 11.

11. To the ALJ's conclusion that Barrett's testimony regarding Kramer smoking marijuana is incredible because Barrett stated he witnessed this event prior to Kramer's hire, because such conclusion is unsupported by record evidence and contrary to substantial evidence in the record. D. 9:20-21.

12. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed both James Maxwell and Kramer smoking marijuana during the work day, because such failure is contrary to substantial evidence in the record. (Tr. 323-24) (unrebutted).

The ALJ similarly mischaracterizes testimony regarding the time of day in which Barrett witnessed James Maxwell and Kramer's marijuana use. D. 8 n. 11. Though the ALJ states Barrett

testified the marijuana use was "off the clock" and that he "did not give a time frame for these observations," the testimony is clear that it occurred during "lunch," and that James Maxwell and Kramer returned to work immediately afterwards. (Tr. 323:3-324:10, 327:1-12).

The ALJ also discredits Barrett because, according to the ALJ, Barrett testified "he saw Kramer and James Maxwell smoking marijuana together in an automobile in 2012 or 2013, (Tr. 323). Kramer did not work for the Cardinals or at Busch Stadium until 2014[.]" Putting aside that such a minor discrepancy in years hardly provides the basis for discrediting a witness, the testimony cited says no such thing. To the contrary, Barrett's testimony shows he recalled *James Maxwell* smoking in a car in 2012 or 2013, but that his observations of Kramer occurred as the misconduct continued subsequently. Specifically:

> Q: Are you aware of James Maxwell ever working under the influence of any illicit substances?
>
> A: Yes.
>
> Q: And how are you aware of that?
>
> A: Seen him do it.
>
> Q: Could you tell us when that happened?
>
> A: Coming back from lunch, him and some other people decided to get high in the back of a car.
>
> Q: You said coming back from lunch. Approximately what year do you recall this happening?
>
> A: 2012, 2013.
>
> Q: And who were the other people in the car?
>
> A: The first time it happened, it was Joe Barrett, and I seen him do it with Gene Kramer also.

(Tr. 323:2-16).

Consequently, the record makes clear that Barrett did, in fact, observe both James Maxwell and Kramer using marijuana during the work day prior to making his decision on whom to offer work. Cases abound in which the Board finds drug use sufficient to establish employers' *Wright Line* rebuttal defenses. *See, e.g., Mariposa Press*, 273 NLRB 528, 546 (1984) (finding *Wright Line* rebuttal defense established for smoking marijuana during a lunch break); *Camvac International*, 288 NLRB 816, 821-22 (1988) (Board reversing ALJ to find *Wright Line* rebuttal defense established for possession of marijuana); *DTR Industries, Inc.*, 350 NLRB 1132, 1137-38 (2007). No reason exists to treat the unrebutted evidence of James Maxwell and Kramer's marijuana use during the work day any differently than the Board has treated such evidence in its prior *Wright Line* determinations. As a result, this evidence constitutes an independently sufficient reason to find Respondent established its *Wright Line* rebuttal defense.

B. Barrett Would Not Have Offered Work to James Maxwell or Kramer, Even Absent Any Purportedly Protected Activities, Because He Observed James Maxwell Exhibiting Poor Work Ethic, and He Observed Poor Work Performance by Both James Maxwell and Eugene Kramer.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

13. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed that James Maxwell went "missing quite a bit" at work, because such failure is contrary to substantial evidence in the record. (Tr. 322) (unrebutted).

14. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed that James Maxwell sometimes slept on the clock, because such failure is contrary to substantial evidence in the record. (*Id.*) (unrebutted).

15. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed that James Maxwell sometimes painted while sitting in a chair, because such failure is contrary to substantial evidence in the record. (Tr. 51-52, 322) (R-6(a)) (photograph of Maxwell painting while sitting on a folding chair) (unrebutted).

16. To the ALJ's failure to find that, at the time of Barrett's offers of work, he viewed painting while sitting down in a chair as "very unprofessional", because such failure is contrary to substantial evidence in the record. (Tr. 322) (unrebutted).

17. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed work by James Maxwell that Barrett viewed as "sloppy", because such failure is contrary to substantial evidence in the record. (*Id*.) (unrebutted).

18. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed that Kramer performed poorly, both at Respondent's Stadium and for contractor Shamel Construction, because such failure is contrary to substantial evidence in the record. (Tr. 295-96, 326) (unrebutted). (*See also* Tr. 250-51) (corroborating testimony from Shamel Construction's owner describing need to refinish hardwood floors due to Kramer's deficient work) (also unrebutted).

19. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed that Kramer's deficient work for Shamel Construction required a large amount of time to fix, because such failure is contrary to substantial evidence in the record. (Tr. 326) (unrebutted).

20. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed that Eugene Kramer's work resulted in evidence of uneven paint, colloquially known as, "skippers", because such failure is contrary to substantial evidence in the record. (Tr. 295-96) (unrebutted).

21. To the ALJ's finding that Barrett did not work with Kramer for Shamel Construction and did not help clean up Kramer's errors, because such finding is unsupported by record evidence and contrary to substantial evidence in the record. D. 9:10-15.

Regarding Barrett's undisputed testimony that James Maxwell exhibited a poor work ethic, and both Maxwell and Kramer performed poorly during their years working together, the case of ***West Covina Disposal*, 315 NLRB 47 (1994)** is directly on-point and highly instructive. There, the ALJ (Decision adopted without comment on this issue by the Board), dismissed an allegation that the employer discriminatorily selected seven union supporters for layoff. *Id*. at 64-66. The ALJ concluded the General Counsel established a *prima facie* case regarding those individuals. *Id*. at 65. However, he went on to observe, "inasmuch as not one of the seven alleged discriminatees testified as a rebuttal witness to deny or explain what [a supervisor] said about him, the supervisor's assessment of each alleged discriminatee's employment history and work ethic was uncontroverted." *Id*. at 65. Thus, based on the supervisor's testimony about the employees' poor work ethic and performance issues, the employer "met its burden of proof and established that it

would have laid off the above seven alleged discriminatees notwithstanding their activities and support for the Union." *Id*. at 66.

West Covina Disposal is indistinguishable from the facts here, where Barrett provided unrebutted testimony regarding James Maxwell's poor work ethic and Maxwell and Kramer's poor work performance. Additionally, whereas the *West Covina Disposal* ALJ (and ultimately the Board) applied the unrebutted testimony to a group of *seven* employees, the facts here require its application only to two specific individuals – James Maxwell and Kramer. No basis exists for assessing Respondent's *Wright Line* rebuttal defense here any differently than the employer's defense in *West Covina Disposal*. *See also Bliss Clearing Niagara, Inc.*, 344 NLRB 296, 313-14 (2005) (ALJ, adopted by the Board without comment, dismissing unlawful suspension allegation because employer testimony regarding "poor work ethic and productivity," including employee's lack of "the requisite 'enthusiasm and zeal' for his work[,]" established *Wright Line* rebuttal defense).

Barrett's unrebutted testimony regarding James Maxwell's poor work ethic and poor work performance is specific and convincing. He explained Maxwell "would go missing quite a bit," would unprofessionally sit down while painting, and performed "sloppy" work. (Tr. 322:2-323:2). Respondent Exhibit 6(a) shows Maxwell painting while sitting down at the Stadium. (R-6(a)) (Tr. 52:1-14). Barrett also testified James Maxwell would sleep on the clock, and described a specific incident of Maxwell sleeping on the job. (Tr. 322:2-323:2).

The unrebutted testimony regarding Kramer's poor performance is equally specific and persuasive. Barrett described uneven painting by Kramer resulting in poor performance as a whole. (Tr. 295:20-296:14, 326:12-22). Additionally, both Barrett and Shamel Construction Owner Bob Shamel recounted very significant problems with Kramer's work for Shamel

Construction. These problems required Shamel and Barrett to spend "more time cleaning up and redoing [Kramer's work than] had we just done it ourselves originally." (Tr. 250:24-251:3, 295:20-296:14). Kramer's poor performance further resulted in the need to refinish hardwood floors at the job site. (*Id*.).

Aside from the ALJ's misguided assertion, discussed *supra*, that James Maxwell and Kramer's performances sufficed for former Painting Foreman Martin, and so they should have also sufficed for Barrett, the ALJ's Decision makes only one direct attack on Barrett's testimony regarding their performances. Regarding Kramer, he incorrectly finds Barrett did not witness Kramer's poor performance with Shamel Construction. To the contrary, Barrett specifically recalled the incident, and testified it took him approximately four hours to clean it up. (Tr. 295:10-296:18). Furthermore, as co-workers at the Stadium under Billy Martin, Barrett necessarily personally observed the job performances of both James Maxwell and Kramer on a regular basis.

Just as in *West Covina Disposal*, the General Counsel failed to dispute the overwhelming evidence of poor performance by both James Maxwell and Kramer. Consequently, as in that case, unrebutted testimony regarding poor work ethic and poor work performance constitutes an independently sufficient basis to establish Respondent's *Wright Line* rebuttal defense.

C. Barrett Would Not Have Offered Work to James Maxwell, Even Absent Any Purportedly Protected Activities, Because He Knew James Maxwell Had Said He Would Not Work for Barrett.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

22. To the ALJ's failure to find that, at the time of Barrett's offers of work, he knew James Maxwell had expressed unwillingness to work for Barrett upon learning that Barrett was named Painting Foreman. (Tr. 32, 57-59, 256-58, 324-25) (statement admitted by Maxwell at Tr. 32, 57-59, Maruyama confirms conveyance of statement to Barrett at Tr. 256-57, and Barrett confirms his knowledge at Tr. 324-25).

23. To the ALJ's conclusion that a purported inability of Barrett to recall dates related to James Maxwell's statement that he "would not work for" Barrett makes the statement "irrelevant

even if true" because such conclusion is irrelevant, unsupported by record evidence, and contrary to substantial evidence in the record. D. 4:1-17, 4 n. 4.

In its prior Decision, the Board noted the lack of clarity in the first ALJD's statement that Barrett's purported inability to recall dates of James Maxwell's statement that he "would not work for" Barrett makes the statement "irrelevant even if true." 369 NLRB 3, slip op. at *2 n. 2. The ALJ's Supplemental Decision here repeats that statement, and does nothing to clarify it. D. 4:1-17, 4 n. 4. Respondent thus remains uncertain as to the ALJ's basis for rejecting James Maxwell's candid comment that he would not work for Barrett as a valid reason for Barrett to select others over James Maxwell for the painting crew. The ambiguity is further heightened because the record is clear, and no party appears to dispute, that Barrett knew of the statement at the time he made offers of work. Even the ALJ's Supplemental Decision describes these conversations, including Barrett's knowledge of them, as occurring in December 2017 and January 2018 (D. 4:8-11), and work offers did not issue until February 2018 (D. 6:21-22).

Specifically, during the call in which Maruyama informed him of Barrett's selection, James Maxwell "very adamant[ly] and passionate[ly]" told Maruyama he could not work with Barrett, and both Maruyama and Barrett testified that Maruyama told him of the statement. (Tr. 256:19-257:10, 324:11-325:16). During his own testimony, James Maxwell admitted that he told Maruyama he could not work with Barrett. (Tr. 32:2-3, 56:12-15). When Maxwell later made a weak attempt to revoke his initial comment by saying he would "bite his lip and try to make it work[.]" Barrett, naturally, found that statement insufficient and disingenuous. (Tr. 257:12-58:15, 325:10-326:1). Although Barrett failed to pinpoint the exact date on which he was made aware of James Maxwell's meek attempted retraction of his earlier emphatic statement, his failure to recollect the exact date on which he learned of the attempted retraction does not diminish the importance of the initial comment. Based on these undisputed statements by James Maxwell,

Barrett believed as a matter of common sense that, had he included James Maxwell as part of his new crew, James Maxwell would have inevitably undermined Barrett's authority as Painting Foreman, and would have negatively impacted the working environment for the crew as a whole.

The conclusion that Barrett would not wish to hire someone who expressed unwillingness to work for him stands as a matter of common sense. Accordingly, the Board has previously treated such a statement as the basis for a valid *Wright Line* rebuttal defense. In *Williamson Piggly Wiggly*, 280 NLRB 1160, 1171 (1986), the ALJ (adopted by the Board without comment on this allegation) found a *prima facie* case rebutted where the alleged discriminatee, who resented her supervisor's selection for his position over her, said she "would not let him boss her around." Similarly, in *Smoke House Restaurant*, 347 NLRB 192, 206 (2006), the Board affirmed an ALJ's finding of a *Wright Line* rebuttal defense where the employer rescinded an offer of employment to an alleged discriminatee who said she would not work the posted schedule.

Furthermore, nothing about James Maxwell's subsequent half-hearted statement that he would "bite his lip" and try to work for Barrett mitigates the impact of his initial statement. (Tr. 257:12-58:15, 325:10-326:1). At best, Maxwell's uncontradicted comments show he had a great deal of reluctance to work for Barrett, and suggests a high probability of day-to-day jealousy. Barrett, like any rational supervisor, did not wish to have such sentiments undermining his authority and the entire crew's working environment. Moreover, the reluctance expressed in the attempted retraction only reinforces the "adamant and passionate" nature of James Maxwell's initial statement. (Tr. 256:19-257:10).

Barrett, in composing the first crew of his tenure as Painting Foreman, possessed no reason to believe James Maxwell would advance the work of his crew while "bit[ing] his lip" every day. As the vast history of business, sports, and other fields attests, a single malcontent can hold any

team back. Thus, James Maxwell's statement was yet another substantial factor contributing to Barrett's decision not to hire him (as well as Maxwell's poor work ethic, work performance, and illegal drug use on lunch breaks). Barrett therefore would have made the same decision absent any purported unlawful animus.

D. Each of the Individual Reasons for Barrett's Decision to Offer Positions on His Crew to Other Painters Establishes an Independently Sufficient Basis to Find Respondent Satisfied Its *Wright Line* Rebuttal Burden.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

24. To the ALJ's conclusion that Barrett's legitimate reasons for not offering work to James Maxwell and Kramer did not concern Barrett until they filed internal Union charges against him, because such conclusion is unsupported by record evidence, and contrary to substantial evidence in the record. D. 9:5-6, 9:16-18, 9:22-25.

The ALJ's statements suggesting the timing of Barrett's concerns about James Maxwell and Kramer lack any basis in the record. While Barrett clearly observed these issues over the course of many years, the 2018 season represented his *first* opportunity to hire a painting crew. Barrett's concerns never manifested themselves with regard to James Maxwell and Kramer prior to the spring of 2018 because Barrett was not the Painting Foreman prior to the spring of 2018. Consequently, the ALJ's conclusion that Barrett never held such concerns prior to that time is entirely unsupported.

Each of Barrett's individual concerns about James Maxwell and Kramer, none of which the General Counsel has presented any evidence to contradict, serves as an independently sufficient basis to find Respondent satisfied its *Wright Line* rebuttal burden. Collectively, the conclusion that Barrett would have made the same decision absent any animus against purportedly protected activities is even more apparent.

IV. The ALJ Erroneously Failed to Find Barrett Possessed Superior Options in His Selection of Painters.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

25. To the ALJ's conclusion that Barrett's testimony does not establish that his other painter options, particularly Dwayne Oehman, were more qualified than James Maxwell and Kramer, because this conclusion is contrary to substantial evidence in the record. D. 6:16-19.

26. To the ALJ's failure to find that, at the time of Barrett's offers of work, he knew Mark Ochs, Michael Burns, Tim O'Neil, Bruce Noss, Dave Sobkoviak, and Duane Oehman had demonstrated strong work abilities, either to Barrett directly or to others whom Barrett trusted, because such failure is unsupported by record evidence, and contrary to substantial evidence in the record. (Tr. 319-21) (unrebutted).

27. To the ALJ's failure to find that Respondent hired Angie Ramshaw to its 2018 painting crew pursuant to an apprenticeship program with the Union, because such failure is unsupported by record evidence, and contrary to substantial evidence in the record. (Tr. 280, 321) (unrebutted).

28. To the ALJ's failure to find that Barrett never witnessed any of the individuals hired to the 2018 painting crew using marijuana during the work day, because such failure is unsupported by record evidence, and contrary to substantial evidence in the record. (Tr. 327) (unrebutted).

Taking all the circumstances into account, the fact that Barrett possessed strong alternatives to James Maxwell and Kramer also sheds light on his decision. On one hand, he had James Maxwell, a painter whose work ethic and work performance he viewed unfavorably, who smoked marijuana on lunch breaks, and who had expressed unwillingness to work for him, as well as Kramer, who shared performance and drug use issues. On the other hand, Barrett had the opportunity to hire six painters who possessed strong reputations (plus an apprentice). (Tr. 318:9-321:10). In fact, one of the superior options Barrett attempted to include on his crew was James's brother Thomas, because he viewed Thomas as "a good painter." (Tr. 321:21-23). Barrett provided specific testimony regarding his knowledge of the others painters' abilities, obtained directly or through other industry members he trusted. (318:9-321:10). The General Counsel offered no testimony (including from the four Charging Party painters) or evidence disputing those individuals' abilities or reputations.

Despite this evidence, the ALJ incredulously found, "Pat Barrett's testimony does not establish that all those hired for the 2018 season were more qualified that any of the discriminatees.

This is particularly true of Duane Oehman. The record does not establish that Barrett had any familiarity with the quality of his work." D. 6:16-19. To the contrary, unrebutted evidence in the record includes Barrett's specific testimony of his impressions of these individuals' work, whether through personal experience or the recommendations of individuals whom he trusted. (Tr. 318:9-321:10). With regard to Oehman, Barrett also testified that he was familiar with Oehman's work for a contractor at the Stadium during the Stadium's construction, and that he knew Oehman through the Union. (320:18-321:10).

None of the considerations Barrett described, without contradiction, bear any relationship whatsoever to the purportedly unlawful animus. To the contrary, Barrett's decisions to hire Ochs, Burns, O'Neil, Noss, Sobkoviak, and Oehman (as well as apprentice Ramshaw), and to offer a position to Thomas Maxwell, instead of James Maxwell and Kramer, accord with sound and rational business practices. The undisputed evidence regarding the quality of painters to whom Respondent actually offered work thus further supports its *Wright Line* rebuttal defense.

V. The ALJ Erroneously Found a Variety of Irrelevant Factors Constrained Barrett in His Selection of His Painting Crew.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

29. To the ALJ's conclusion that prior practices by Respondent limited Barrett's full discretion to hire his painting crew, and failure to find that Barrett possessed full discretion in hiring his crew, because such conclusion and failure are unsupported by the record and contrary to substantial evidence in the record. D. 3:20-24, 10:5-14.

30. To the ALJ's conclusion that former Painting Foreman Billy Martin's practices constrained the discretion of Barrett and/or Respondent overall in filling the painting crew, because such conclusion is unsupported by the record and contrary to substantial evidence in the record. D. 3:2-9, 3:19-23, 8:24-25.

31. To the ALJ's finding that Respondent employed James Maxwell as a "full-time" painter, because such finding is unsupported by the record and contrary to substantial evidence in the record. D. 2:39-39, 2 n. 2.

32. To the ALJ's conclusion that standard security background check letters issued to the alleged discriminatees prior to Barrett's appointment as Painting Foreman constrained Barrett's discretion in filling the painting crew, because such conclusion is unsupported by the record and contrary to substantial evidence in the record. D. 3:14-19, 3 n. 3, 9:40-10:14.

33. To the ALJ's conclusion that Barrett's hiring of his painting crew through means other than the Union's hiring hall undermines Respondent's *Wright Line* rebuttal defense, because such conclusion is unsupported by the record and contrary to substantial evidence in the record. D. 6:5-16.

The unique nature of the year 2018 in Respondent's painting crew selection process warrants particular emphasis. The ALJ refers to prior Painting Foreman Billy Martin's hiring practices, and prior practices by Respondent as a whole, in describing Barrett's decisions as inconsistent. (D. 3:2-23, 8:24-25, 10:5-14). Martin's practices and crew preferences, however, did not apply to Barrett's assembly of the first crew of his tenure. To wit, Barrett testified:

> Q: Now, who made the hiring decisions for the 2018 season?
>
> A: I did.
>
> Q: In making those decisions, were you bound in any way by decisions that Billy Martin had made in the past?
>
> A: No, sir.
>
> Q: Is this the first time you've ever hired painters for the Stadium?
>
> A: Yes, sir.

(Tr. 313:7-14).

Director of Stadium Operations Hosei Maruyama confirmed this sole discretion possessed by Barrett:

> Q: Now, after Patrick Barrett was hired as the Painting Foreman, who was responsible to actually hire the Painters?
>
> A: Patrick was.

(Tr. 258:21-24).

This wide discretion afforded to Barrett as the Painting Foreman accorded with the same discretion Martin possessed as the prior Painting Foreman. (Tr. 283:25-284:3).

In other words, Barrett worked from a clean slate. Any attempt to view his decisions as continuations of Martin's tenure fails to account for the unique circumstances of 2018. That year represented the first time in ***35 years*** in which someone other than Martin exercised the opportunity to apply his preferences to his own crew. (Tr. 283:25-284:3).[4] Consequently, any deviation from Martin's practices represents merely the natural implication and result of Barrett's new tenure.

The Board consistently recognizes, even in the Section 8(a)(5) unilateral change context, that new members of management may legitimately apply their own practices. *See, e.g., Wabash Transformer Corp.*, 215 NLRB 546 (1974) (dismissing Section 8(a)(5) allegation where new management instituted interviews of employees in default on productivity standards and discharged employees under those standards); *The Trading Port, Inc.*, 224 NLRB 980, 982-83 (1976) (dismissing Section 8(a)(5) allegation based on more stringent enforcement of standards by new management); *Service Spring Co.*, 263 NLRB 812, 812-13 (1982) (same).

The Supplemental Decision also refers to two other factors that should not be viewed as constraining Barrett's discretion. First, it refers to letters (GC-10, 11, 12) received by the Maxwell brothers and Kramer on November 2, 2017 (well prior to Barrett's appointment as Painting Foreman), implicitly suggesting the letters serve as evidence that Barrett held an obligation to hire them. D. 3:14-19, 3 n. 3, 9:40-10:14. Barrett explained, however, that the painters received the

[4] Bound up in this issue is the ALJ's vague finding that James Maxwell worked as a "full-time" painter, or at least "worked more hours" than others. D. 2:39-39, 2 n. 2. The Supplemental Decision also states this issue would not be relevant except in a Compliance proceeding. *Id*. To the extent the ALJ relies upon this finding to assert "full-time" or "more hours" status somehow bound Barrett to include James Maxwell on his crew, Respondent excepts to that finding. Barrett provided specific examples demonstrating that the Painting Foreman is the only "full-time" painter employed by Respondent. (Tr. 281:6-282:16).

letters only because Respondent must receive releases for Annual Criminal Background Checks pursuant to Department of Homeland Security requirements. Specifically, he testified:

> Q: Are those documents only given to painters?
>
> A: No, everybody gets one.
>
> Q: When you say "everybody," who(m) do you mean?
>
> A: All of the Cardinals employees.
>
> Q: Did those letters factor into your decision at all regarding who(m) to make offers to in 2018?
>
> A: Oh, no.

(Tr. 313:18-314:16).

Any suggestion that these letters did, in fact, constrain Barrett's discretion would nullify the overwhelming weight of record evidence establishing that the Painting Foreman possesses sole discretion to hire the painting crew. Even James Maxwell and Kramer themselves both testified that they "knew" they would not be asked to return to the painting crew immediately upon learning (after receiving the letters and before filing their internal union charges) that Barrett received the Painting Foreman position. (Tr. 63:21-24, 80:19-25, 178:9-14, 188:8-11).

The Supplemental Decision also incorrectly implies Barrett's reasons for declining to offer work to James Maxwell and/or Kramer are somehow undermined by the fact that he did not formally utilize the Union's hiring hall. D. 6:5-16. Although Barrett consulted the Union's out-of-work list (Tr. 314:3-6), the collective bargaining agreement only requires signatory employers to hire Union members in good standing. (GC-2, Sec. 7) (Tr. 100:6-16) (testimony by Union representative Greg Smith). Thus, the Union contract did not require Barrett to use its non-exclusive hall, and did not constrain his discretion beyond the need to hire Union members.

The record leaves no doubt that Barrett, as the new Painting Foreman, could hire whomever he felt comfortable hiring onto the Spring 2018 crew. Barrett's promotion, as Respondent's first new Painting Foreman in decades, brought a clean slate to the Painting Department at Busch Stadium. As a result, the Board must reject the ALJ's erroneous implications that his hiring decisions were constrained by past practices, standard form background check documents distributed to all 2017 part-time and seasonal employees, or the Union's hiring hall.

VI. The ALJ Erroneously Rejected a Full Settlement of the Allegations Regarding Eugene Kramer After Kramer Rendered Himself Ineligible for Reinstatement Through Threats of Physical Violence Against Barrett and Respondent's Legal Representatives.

In support of its contention that, absent dismissal of the allegations regarding Kramer, the Board should reverse the ALJ's rejection of a Settlement Agreement executed by the General Counsel and Respondent regarding Kramer's allegations, Respondent excepts:

34. To the ALJ's April 8, 2020 Order Rejecting Settlement in response to the General Counsel and Respondent's Joint Motion for Administrative Law Judge to Approve Compliance Agreement and Request for Order to Show Cause, because such rejection is contrary to substantial evidence in the record and contrary to law.

35. To the ALJ's May 8, 2020 Order Rejecting Respondent's Motion for Reconsideration of Order Rejecting Settlement, because such rejection is contrary to substantial evidence in the record and contrary to law.

36. To the ALJ's adherence to his prior rejections of the Settlement Agreement in his ALJD. D. 1-2 n. 1.

37. To the ALJ's failure to find that Kramer's threats of severe physical violence against Barrett and Respondent's counsel, as documented in a Federal Protective Services Report attached to Respondent's Motion for Reconsideration, renders Kramer ineligible for reinstatement, because such failure is contrary to substantial evidence in the record and contrary to law. Motion for Reconsideration, Exhibit 3.

On February 6, 2020, Kramer issued very serious and disturbing threats of physical violence against Barrett and Respondent's counsel during a telephone call with Board agent, Bradley Fink. Specifically, and as reflected in a Federal Protective Services Report, Kramer stated,

"Him and his boys would take Pat Barrett to the top of the stadium and make him fall off[,]" and regarding Respondent's counsel, Kramer "would fuck him up." Motion for Reconsideration, Exhibit 3.

Subsequently, the General Counsel agreed that Kramer's threats of physical violence rendered him ineligible for reinstatement, and Respondent agreed to settle the allegations regarding Kramer with a full remedy, including backpay through the date of the threats. In accordance with that agreement, the General Counsel and Respondent submitted to the ALJ a Joint Motion for Administrative Law Judge to Approve Compliance Agreement and Request for Order to Show Cause. After the ALJ issued an Order to Show Cause, Kramer submitted an incoherent response letter to the ALJ which completely failed to address or even acknowledge the threats.

However, on April 8, 2020, the ALJ issued an Order Rejecting Settlement in which the Joint Motion filed by the General Counsel and Respondent was denied. Respondent then filed a Motion for Reconsideration of that Order, which attached the Federal Protective Services Report, and served the Motion and Exhibits on Kramer, as well as the other parties, thus providing Kramer with an additional opportunity to respond. On May 8, 2020, the ALJ issued an Order Rejecting Respondent's Motion for Reconsideration of Order Rejecting Settlement, stating that he would not approve the Settlement Agreement "unless attorney Fink testifies under oath as to what Kramer said to him and Kramer has the opportunity to contradict him under oath and or explain the circumstances of their conversation." However, the ALJ's Order failed to address Respondent's following comments in its Motion for Reconsideration that:

> Respondent would not object to a prompt evidentiary hearing at this stage of the proceedings if the ALJ deems such a hearing necessary. In the event the ALJ finds such a hearing appropriate, the hearing should occur in the near future, rather than left for potential compliance proceedings, to minimize the potential for witnesses' memories of events to fade over time.

> Nonetheless, Respondent believes Exhibit 3 speaks for itself, and provides Kramer with adequate notice of the allegations against him. Thus, Kramer's rights would be adequately vindicated through the opportunity to respond in writing.

When the ALJ issued his Supplemental Decision, he only noted his prior denial of these Motions, and transferred the case to the Board. D. 1-2 n. 1.

The ALJ's refusal to approve the Settlement Agreement here constitutes clear error. "[T]he Board has held that it may deny remedial reinstatement if the employer can prove the alleged discriminatee engaged in misconduct so flagrant as to render the employee unfit for further service, or a threat to efficiency in the workplace." *Aerotek, Inc.*, 365 NLRB No. 2, slip op. at 3 (2016) (citing *Hawaii Tribune-Herald*, 356 NLRB 661, 662 (2011)) (internal emphasis and quotations omitted). Well-established Board precedent holds that threats of physical violence establish ineligibility for reinstatement. *See, e.g., Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1045-48 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).

To the extent the ALJ's actions imply a desire to reserve the issue of Kramer's ineligibility for reinstatement for compliance proceedings, such a desire does not accord with the Board's handling of such issues. Instead, ALJs and the Board routinely address issues of eligibility or ineligibility for reinstatement prior to the compliance stage of proceedings, alongside other substantive merits issues. *See, e.g., Aerotek, Inc.*, 365 NLRB No. 2 (2016); *Staffing Network Holdings, LLC*, 362 NLRB 67, 76 (2015); *American Medical Response of Connecticut, Inc.*, 359 NLRB 1301, 1306 (2013); *Teen Triumph*, 358 NLRB 11 (2012); *Allied Mechanical Services, Inc.*, 341 NLRB 1084 (2004); *Diamond Walnut Growers, Inc.*, 340 NLRB 1129, 1145 (2003); *USF Red Star, Inc.*, 330 NLRB 53, 59 (1999).

Due to the severity of Kramer's threats, and the clarity of Board precedent regarding ineligibility for reinstatement under such circumstances, no realistic possibility of reinstatement exists for Kramer. Furthermore, given such ineligibility, Respondent has agreed to a full remedy

in the Settlement Agreement. Further proceedings regarding Kramer, whether before the Region, an ALJ, the Board, or a Court of Appeals, would thus constitute an unnecessary waste of everyone's time and resources. As a result, even if the Board incorrectly fails to dismiss the allegations regarding Kramer pursuant to Respondent's *Wright Line* rebuttal defense, it should approve the Settlement Agreement entered into by the General Counsel and Respondent.

VII. The ALJ Erroneously Issued a Recommended Order and Remedies.

Because the ALJ erred in his overall Supplemental Conclusion of Law, in the issuance of a Recommended Order and Remedies, and with regard to the specific remedies contained therein, Respondent excepts:

38. To the ALJ's conclusion that Respondent failed to establish its *Wright Line* rebuttal defense because this finding is contrary to law and contrary to the substantial evidence in the record, and is unsupported by the record. D. 6:28-32, 7:19, 9:36-38.

39. To the ALJ's finding that Respondent violated Section 8(a)(1) and (3) of the Act with regard to James Maxwell and Kramer, because this finding is contrary to law and contrary to the substantial evidence in the record, and is unsupported by the record. D. 10:18-19.

40. To the ALJ's issuance of remedies, because any remedy is contrary to law and contrary to the substantial evidence in the record, and is unsupported by the record. D.10:21-11:2, Appendix.

41. To the ALJ's issuance of his recommended Order, because any Order, other than an Order dismissing the allegations regarding James Maxwell and Kramer, is contrary to law and contrary to the substantial evidence in the record, and is unsupported by the record. D. 11:4 to D. 12:18, 12 n. 14.

42. To the ALJ's proposed remedy that Respondent compensate James Maxwell and Kramer for any adverse tax consequence of receiving a lump-sum backpay award as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), because this remedy exceeds the Board's remedial authority. D. 10:39-11:2.

43. To the ALJ's proposed remedy that Respondent compensate James Maxwell and Kramer through backpay that includes interest compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital*

Corp. v. NLRB, 647 F.3d 1137 (D.C. Cir. 2011), because this remedy exceeds the Board's remedial authority. D. 10:26-27, 10:34-35.

44. To the ALJ's proposed remedy that Respondent compensate James Maxwell and Kramer for search-for-work and interim employment expenses because search-for-work and interim employment expenses are a normal and routine aspect of employment in this industry, and this remedy exceeds the Board's remedial authority if such expenses exceed interim earnings. D. 10:27-29, 10:35-37.

As explained *supra*, Respondent did not violate the Act in any manner by declining to offer work to James Maxwell and/or Kramer. Consequently, the ALJ erred in issuing any Order other than an Order dismissing the allegations, and in finding remedies appropriate. Additionally, the ALJ also erred in ordering remedies consistent with *AdvoServ* and *Kentucky River* because such remedies exceed the Board's remedial authority.

The Board's authority to grant relief is limited to remedial relief. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940) citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267-68 (1938). It is not authorized to require punitive relief. *Consolidated Edison*, 305 U.S. at 235-36.

The ALJ's proposal that Respondent compensate employees for "adverse tax consequence[s] of receiving a lump-sum backpay award" encroaches upon punitive grounds. The objective of backpay is to replace wages the employee lost. Once an employer has made such a replacement, its obligation is satisfied. The Act lends no support to the *AdvoServ* theory that an offending employer "caused" adverse tax consequences. Such an employer exercises no control over the Internal Revenue Code. Furthermore, in compliance proceedings, an employee concerned about tax consequences may negotiate an installment payment plan if he or she finds such a plan

advantageous. As a result, the ALJ's proposal that Respondent compensate employees for adverse tax consequences must be reversed.

The requirement that interest on backpay be compounded daily under *Kentucky River* further exceeds the Board's remedial authority. Daily interest compounding is unavailable in most private investments. Consequently, the *Kentucky River* standard causes backpay to grow far faster than it would grow if employees had never lost the earnings, thus creating a punitive result for employers. The Board should therefore reverse *Kentucky River*, and the ALJ's proposed daily compounding of interest.

Similarly, Respondent should not be compelled to compensate James Maxwell or Kramer for search-for-work and interim employment expenses. Painters in the industry perform seasonal, short-term work. (initial ALJD at 2:9-15). Consequently, search-for-work and interim employment expenses would have been incurred by the Charging Parties regardless of Respondent's 2018 hiring decisions. Search-for-work expenses would thus provide a windfall to the Charging Parties.

A windfall may also result if, under *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Board requires compensation for search-for-work expenses, even if such expenses exceed interim earnings. As former Chairman Miscimarra explained in dissent to that decision (slip op. at **9-16), the *King Soopers* approach produces a windfall in certain cases, creates a substantial risk of protracted litigation, and is inconsistent with the practices of other agencies under other employment statutes. As a result, the Board should overrule *King Soopers* and reverse this aspect of the ALJ's proposed remedies.

VIII. Conclusion

For all of these reasons, the Board must dismiss the allegations regarding each of James Maxwell and Kramer. In the alternative, if the Board incorrectly finds merit to the allegation regarding Kramer, it must deem him ineligible for reinstatement due to his severe threats of physical violence, and therefore approve the Settlement Agreement entered into by the General Counsel and Respondent.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT
ST. LOUIS CARDINALS, LLC

Dated: June 12, 2020

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2020 I filed RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION AND ORDER REJECTING SETTLEMENT, and BRIEF IN SUPPORT of same via the National Labor Relations Board's E-File system, and via email, to the following parties:

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